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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 267

THE BANK OF CALIFORNIA NATIONAL ASSOCIATION, Executor of the Estate of Margaret Eyre Girvin, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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To the Honorable Chief Justice Fred M. Vinson and to the Honorable Associate Justices of the Supreme Court of the United States:

Now comes your petitioner, the above named The Bank of California National Association, Executor of

the Estate of Margaret Eyre Girvin, deceased, the petitioner in the above entitled proceeding, by its Attorneys Allen G. Wright, Randell Larson and Edward Hale Julien, and respectfully requests that a rehearing be granted of its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decision of that Circuit Court of Appeals, reversing a decision of the Tax Court of the United States and in support of this petition your petitioner submits the argument which follows. The petition for said writ of certiorari for which a rehearing is requested was denied by this Court on the 14th day of October, 1946.

ARGUMENT.

1. THE GROUNDS FOR REHEARING.

Since the decision was rendered on April 11, 1946 by the Circuit Court of Appeals for the Ninth Circuit herein, on the authority of Sec. 81.17 of Treasury Regulations 105 (T. 56), that section of those regulations has been amended by the Commissioner of Internal Revenue on May 1, 1946.

Since the petition for said writ of certiorari was filed July 3rd, 1946 with this Court, the advance program of the American Bar Association has been published for its sixty-ninth annual meeting at Atlantic City, New Jersey, commencing October 28, 1946 in which there appears on its agenda (Advance Program p. 130 item 1—70 Reports Am. Bar Assoc. pp. 138,

139) certain measures regarding proposed tax legislation affecting Sec. 811(a) I.R.C. and bearing upon the problem raised by said petition for a writ of certiorari.

The foregoing circumstances and their bearing upon this case, and our comments thereon, as we shall briefly develop them, are among the grounds upon which we shall base this petition for rehearing.

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2. THE CHANGES MADE IN SEC. 81.17 TREAS. REG. 105 ON MAY 1, 1946.

In the petition for said writ of certiorari, emphasis was stressed upon (1) the intention of the settlor in determining whether the trust deed indicated any testamentary purpose on her part, and (2) the absence of any "string" which would otherwise indicate a purpose to reserve some interest in the corpus of that trust beyond her life estate interest therein. That these factors were important factors gains some recognition from the character of the changes made by the amendment of May 1, 1946 in sec. 81.17 Treas. Reg. 105.

The first change noted in the amendment is found in the heading. This heading at the time when the Circuit Court of Appeals rendered its decision herein read, "Transfers conditioned upon survivorship". It now reads, "Transfers *intended* to take effect at or after the decedent's death" (emphasis ours). The emphasis by this amendment has subtly shifted from "survivorship" as the vital factor to "intention".

Some of the changes effected by this amendment are merely verbal. The section 81.17 as amended, however, contains this new matter, "The decedent shall not be deemed to possess a right or interest in the property, if his right or interest consists solely of an estate for his life".

In this case the right or interest of the decedent did consist solely of an estate for her life. She made no other reservation. Upon her death the property was to go to her adult children, Richard Girvin and Lee Tevis in slightly unequal parts, or, if either should die during the life of the decedent, leaving issue, such issue should take the share of their parent in equal shares, or, otherwise, the property would go to the surviving child or his or her issue (T. 21, 24). At the time of making this trust in 1924 the decedent's age was 62 years (T. 17), both of her children were then living and the son then had three children living, and the daughter then had two children living. At the time of the decedent's death in 1941 her said two children and their aforesaid five children were still living (T. 26).

The serious criticism which we make with respect to sec. 81.17 Treas. Reg. 105 as it read when the Circuit Court of Appeals for the Ninth Circuit rendered its decision in this Girvin estate case and as it has been amended to read since, is that in neither revision has it given any recognition to the vital differences between the provisions of the Revenue Acts now codified in section 811(a) I.R.C., as they read prior to the amendments of 1931 and 1932 and as they have

read since those amendments nor any significance to the fact that those amendments of 1931 and 1932 operated prospectively only. These significant distinctions are developed in said petition for said writ of certiorari. This Girvin case does not come precisely within the scope of the examples cited in the amended sec. 81.17 of Treas. Reg. 105. It is apparent that the Girvin case was not believed to come within this sec. 81.17 from the note attached to the comment on that section in C.C.H. Fed. Est. & Gift Tax Rep. Par. 3430 par 10 reading as follows:

> "If the possibility that the property or its control will revert to the transferor or his estate results from his placing a condition in the instrument of transfer, the transfer is taxable regardless of how remote the possibility may be. If, however, the possibility exists because of the laws of intestacy and the possibility is remote, the transfer is not taxable * * * Recently, however, two courts have refused to follow this doctrine. They decided that a possibility of reverter by operation of law will result in taxability. See Com. v. Bank of California, N. A. Exec. (Est. of M. E. Girvin) (C.C.A.-9) 46-1 U.S.T.C. par 10263 and Com. v. Est. of Bayne (C.C.A.-2) 46-1 U.S. T.C. par 10272. It would appear, therefore, that Supreme Court action is necessary to settle this question."

It was in order that this question should be settled by this Court that your petitioner requested said writ of certiorari and now requests a rehearing of its petition in that behalf. It is our belief that *May v. Heiner,* 281 U. S. 238, 50 Sup. Ct. 286, is still law, that it gov-

erns the *Girvin* case, and that the circumstances in the *Girvin* case cannot be distinguished from *May v. Heiner.*

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3. THE TAX PROGRAM OF THE AMERICAN BAR ASSOCIATION.

It is now the law that where the corpus of a transfer in trust is to be included in the gross estate of a decedent for tax purposes, because of the possibility of reverter, however remote or improbable, the value of that property for tax purposes shall be the value of that corpus at the date of death no matter how much it may exceed the maximum value which the possibility of that reverter itself might command in any market. *Com. v. Field,* 324 U.S. 113. This, in its practical application frequently makes a harsh rule. The House of Delegates of the American Bar Association accordingly at its Fourth Session on December 20, 1945 in Cincinnati, Ohio, upon the recommendation of the Section of Taxation adopted the following resolution:

"1. ESTATE TAX—POSSIBILITIES OF REVERTER

RESOLVED, That the American Bar Association recommends to Congress that the provisions of the Federal Estate Tax Law relating to the taxation of transfers wherein the settler retains, or there exists by operation of law, a reverter, reversion or other similar interest, be amended to make clear that only the value of such retained interest shall be included in the gross estate of the settler.

BE IT FURTHER RESOLVED, That the Association proposes that this result be achieved by amending section 811 of the Internal Revenue Code; and

BE IT FURTHER RESOLVED, That the Officers and Council of the Section of Taxation are directed to urge the following amendment, or its equivalent in purpose and effect, upon the proper committees of Congress:

(1) Section 811(a) of the Internal Revenue Code is amended to read as follows:

"(a) DECEDENT'S INTEREST. To the extent of the interest therein of the decedent at the time of his death. In the case of a transfer of property, by trust or otherwise, heretofore or hereafter made by a decedent during his lifetime where the decedent's only interest in the property is a reverter, reversion, possibility of reverter, contingent remainder, or other similar interest, only the value of the decedent's interest in such property at the time of the decedent's death shall be included in the gross estate. *The value of such reverter, reversion, possibility of reverter, contingent remainder, or other similar interest, shall be determined according to established actuarial principles. Where, however, the interest of the decedent is incapable of valuation according to established actuarial principles, such interest shall be deemed to have no value.* The effect of spendthrift clauses or other language preventing vesting, alienation or anticipation shall not be considered in determining value."

(2) Section 811 (c) of the Internal Revenue Code is amended by inserting after the second

"or" in the first full sentence after the title of said subsection (c) the following:

"(except as otherwise provided in subsection (a))"

so that said section 811 (c) will read as follows:

"(c) TRANSFERS IN CONTEMPLATION OF, OR TAKING EFFECT, AT DEATH. To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise, in contemplation of or (except as otherwise provided in subsection (a)) intended to take effect in possession or enjoyment at or after his death," etc. (No other change made in balance of subsection.)

(3) The amendments made by the preceding sections (1) and (2) shall be applicable to estates of decedents dying on or after June 1, 1935."

(Emphasis ours.) (70 Reports of American Bar Association 1945 pp. 138-139.)

The program for the coming annual meeting of the American Bar Association (pp. 130, 131) indicates that this resolution has been and will continue to be pressed by that Bar Association.

The amendment to section 811(a) I.R.C. proposed in that resolution is so fair and reasonable that it should be and probably will be accepted by the Congress when it is again assembled. If the law were so amended, the value of the possibility of reverter in this Girvin estate, would be only such, for tax purposes, as could be determined according to established

actuarial principles, and if not so determinable would be of no value at all. The possibility of such a legislative change of itself can of course form no proper basis for a rehearing of said petition for a writ of certiorari. But where a large section of the American Bar takes exception to the present measure of the value of a remote and improbable possibility of reverter for tax purposes, and sensing a certain injustice therein, appeals to the Congress as the proper source for relief, may we not, with some propriety, appeal to this Court to reconsider its order of October 14, 1946 and grant a rehearing of the petition for said writ of certiorari, which raises an important allied question of tax law that many sections of the American Bar have been hoping that this Court would decide definitely, ever since the Circuit Court of Appeals for the Ninth Circuit rendered its decision affecting the trust transfer in this Girvin case. Aside from the members of the Bar who have been in communication with us, the notation of the C.C.H. quoted above clearly reveals the widespread interest in the questions raised in the *Girvin* case and the *Bayne* case.

PRAYER FOR REHEARING.

We believe that there is merit in the petition for said writ of certiorari and would appreciate an opportunity to argue in due course before this Court the issues raised in that petition for certiorari and

it is requested that a rehearing thereof be granted accordingly.

Dated, San Francisco, California,
October 30, 1946.

Respectfully submitted,
ALLEN G. WRIGHT,
RANDELL LARSON,
EDWARD HALE JULIAN,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I, the undersigned, Allen G. Wright, one of the counsel for the petitioner in the foregoing petition for rehearing hereby certify that said petition is presented in good faith and not for delay.

Dated, San Francisco, California,
October 30, 1946.

ALLEN G. WRIGHT,
Of Counsel for Petitioner.